

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

HUSSEY COPPER, LTD.,)	
)	
Plaintiff,)	
)	
v.)	
)	
ROYAL INSURANCE COMPANY OF)	Lead Case at Civil Action No. 07-758
AMERICA,)	
)	
Defendant.)	Judge Flowers Conti
)	Magistrate Judge Caiazza
)	
FEDERAL INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	
)	
HUSSEY COPPER, LTD.,)	
)	
Defendant.)	

MEMORANDUM ORDER

On June 14, 2007 and December 4, 2007, the two cases (Civil Action Nos. 07-758 and 07-1286) consolidated under the lead caption above were referred to United States Magistrate Judge Francis X. Caiazza for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges.

On May 6, 2008, the magistrate judge issued a Report and Recommendation (the “R&R”) (Doc. 32) recommending that the parties’ cross-motions for summary judgment (Docs. 15, 17, 19 and 23) be granted in part, denied in part, and denied in part without prejudice, as described in

the R&R. It was also recommended that the Motion for Leave to File Amended Complaint against Royal Insurance Company of America (“Royal”)(Doc. 14) filed by Hussey Copper, Ltd. (“Hussey”) be denied as futile.

Service of the Report and Recommendation was made on the parties, Hussey filed objections on May 22, 2008. *See* Docs. 33 - 38. On June 2, 2008, Royal filed a response to Hussey’s objections and Federal Insurance Company (“Federal”) also filed a response to Hussey’s objections on June 2, 2008. The objections essentially reargued issues which were adequately addressed and rejected in the R&R.

After a *de novo* review of the pleadings and submissions in the case, together with the R&R, the objections thereto and the responses to the objections, the following Order is entered:

AND NOW, on this 29th day of July, 2008, IT IS HEREBY ORDERED that:

- (a) Hussey’s Motion to Amend its Complaint against Royal (**Doc. 14**) is **DENIED AS FUTILE**;
- (b) Royal’s Motion for Summary Judgment against Hussey (**Doc. 15**) is **GRANTED** regarding its “absolute” pollution exclusion (*see* R&R at 5-6), subject to a recognition that the denial of coverage may be barred by regulatory estoppel (*see id.* at 19), and **DENIED WITHOUT PREJUDICE** to the extent further analysis regarding regulatory estoppel is appropriate;
- (c) Federal Insurance Company’s (“Federal’s”) Motion for Summary Judgment against Hussey (**Doc. 17**) is **GRANTED** regarding its unmodified “absolute” pollution exclusion (*see* R&R at 5-6), subject to a recognition that the denial of coverage may be barred by regulatory estoppel (*see id.* at 19), and **DENIED WITHOUT PREJUDICE** to the extent further analysis regarding regulatory estoppel is appropriate;
- (d) Federal’s Motion for Summary Judgment against Hussey (**Doc. 17**) is **DENIED** regarding its “modified” pollution exclusion (*see* R&R at 9-13), although any duty to defend flows from, and should be

limited to, the policies in operation from August 2002 until August 2004 (*see id.* at 13 n.5);

- (e) Hussey's Motion for Partial Summary Judgment Against Royal (**Doc. 19**) is **GRANTED** regarding its request for discovery in support of its regulatory estoppel theory, but only as related to purported representations to the Pennsylvania Insurance Department (*see* R&R at 14-19);
- (f) Hussey's Motion for Partial Summary Judgment Against Royal (**Doc. 19**) is otherwise **DENIED**;
- (g) Hussey's Motion for Partial Summary Judgment Against Federal (**Doc. 23**) is **GRANTED** regarding its request for discovery in support of its regulatory estoppel theory, but only as related to purported representations to the Pennsylvania Insurance Department made regarding its unmodified "absolute" pollution exclusion (*see* R&R at 14-19 & n.11); and
- (h) Hussey's Motion for Partial Summary Judgment Against Federal (**Doc. 23**) is otherwise **DENIED**.

IT IS FURTHER ORDERED that: the Report and Recommendation of Magistrate Judge Caiazza dated May 6, 2008 is hereby adopted as the opinion of the district court; and the parties are ordered to participate in a telephone conference, to be scheduled before the magistrate judge, to discuss Hussey's taking limited, expedited discovery regarding the issue of regulatory estoppel.

/s/ Joy Flowers Conti
Joy Flowers Conti
United States District Judge

cc (via email):

David E. White, Esq.
William M. Wycoff, Esq.
Ralph J. Luongo, Esq.
William P. Shelley, Esq.